IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM ROBERT BILL,
Plaintiff

v. CIVIL ACTION NO. 05-154 ERIE

TROOPER VICTOR J. STERNBY,
Defendant

HEARING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Courtroom C, U.S. Courthouse, Erie,

Pennsylvania, on Thursday, June 29, 2006.

APPEARANCES:
STEVEN C. FEINSTEIN, Esquire, appearing on
behalf of the Plaintiff.

MARY LYNCH FRIEDLINE, Esquire, Senior Deputy

Attorney General, appearing on behalf of the Defendant.

P R O C E E D I N G S

(Whereupon, the proceedings began at 10:10 a.m., on Thursday, June 29, 2006, in Courtroom C.)

THE COURT: This is the time we've set for argument at Civil Action 05-154 Erie, on defendant's motion for summary judgment. I've had a chance to read the briefs, and equally pertinently, I've had a chance to take a look at the tape. Do you want to come up to the podium.

MS. FRIEDLINE: Thank you, your Honor. Good morning, your Honor, I'm Mary Friedline with the Attorney General's Office, for Trooper Sternby with the state police.

Your Honor, as you know, this case involves an incident in which Mr. Bill, the plaintiff, fell and struck his head in the course of a DUI arrest. He appeared from the tape to pass out after about approximately 10 minutes from exiting his truck. And the plaintiff himself has no recollection of these events. The plaintiff's claim is essentially that the trooper knew or should have known that he was highly intoxicated and, therefore, should have taken precautionary measures, stopped the field sobriety test, and not attempted a preliminary breath test.

THE COURT: Could I interrupt you just for one second.

3

MS. FRICK: Sure.

THE COURT: To see if there's agreement between you and plaintiff's counsel on this point. And that would be the conscience-shocking standard that governs this case. Do you agree that given that it's somewhere between -- since it's somewhere between instantaneous decision and the luxury of being able to reflect for some period of time, like in a prison with medical personnel, that it would likely be the middle ground of gross negligence or arbitrariness sufficient to shock the conscience?

MS. FRIEDLINE: That's been my position, your Honor, and that's set forth in our brief.

THE COURT: Do you agree with that?

MR. FEINSTEIN: No, we don't dispute that that's the standard.

THE COURT: All right, go ahead.

MS. FRIEDLINE: Your Honor, we've moved for summary judgment essentially on two grounds. That the record does not support the state-created danger theory claim. And, also, that alternatively that this record establishes that the trooper in any event would be entitled to qualified immunity with respect to his conduct in this arrest.

THE COURT: Let's go backwards, because a lot of times, oftentimes in cases like this the circuit, and they've done it with me, they go right to the qualified immunity issue

first. So let's do it that way.

MS. FRIEDLINE: That's fine, your Honor. Your Honor, I think this case is led by the recent Third Circuit case in Smith_v._Marasco. In which that is exactly what happened. The court had already determined, I think on a prior ruling, I call it Marasco_I in my brief, that there was a question of fact. At least as to willful misconduct for the state-created danger, and possibly some of the other prongs. But the court, nonetheless, went on to grant summary judgment on qualified immunity in that case.

And in that particular case the court looked at the Kneipp decision from 1996 and said what are the contours of the right that was -- the constitutional violations that was established in Kneipp, recognizing that that right has to be sufficiently clear so that a reasonable officer would understand that he's violating the right.

Plaintiffs, I submit, have characterized the Kneipp decision in what it held and what it said to officers as too simplistic. As saying, essentially, that if you've got an intoxicated person, you can't place them in danger. If you do, you violated their constitutional rights.

Smith_v._Marasco looked at this quite carefully, and citing back to the Third Circuit's previous decision in Rivas, developed and stressed the contours of what was being discussed in Kneipp. And in that case what has emerged is essentially

that a state actor may not abandon a private citizen in a dangerous situation provided that the state actor is aware of the risk of serious harm and partly responsible for causing or creating the opportunity for that to happen.

THE COURT: Is that Marasco summarizing Kneipp?

MS. FRIEDLINE: It's actually Marasco summarizing Rivas summarizing Kneipp. But they said basically what was happening, I think the dated issue in Marasco is 1999. So they said as of 1999 what has our law established as the contours of this duty.

THE COURT: You can't abandon a helpless individual whom you know or reasonably should know is helpless, in other words?

MS. FRIEDLINE: And if you helped to create the situation of the helplessness. That's essentially -- and what we had in Kneipp, keep in mind was a woman who was clearly drunk and for purposes of this case, we can say she's highly intoxicated and so is Mr. Bill.

THE COURT: No doubt he was intoxicated.

MS. FRIEDLINE: Right. Certainly afterwards his blood alcohol establishes that. But there is no doubt that the officer at a certain point in time in the field sobriety test suspected that as well, there's no question. I submit, and the video shows, his passenger was in much worse shape.

THE COURT: He appeared to be.

MS. FRIEDLINE: Yes. And I wouldn't be here if the passenger were the plaintiff in this case necessarily making the same argument, your Honor.

THE COURT: Because of the level of intoxication and, therefore, the increased danger?

MS. FRIEDLINE: Well, I shouldn't say that --

THE COURT: You just did.

MS. FRIEDLINE: I probably just put my head in a noose. I think on a summary judgment I might have had a little more pause arguing the man was falling down, unable to stand on his own. He was yanked and held up by the officer. Now, I'm not talking about the rest of the tape when he tried field sobriety tests, but at least at the very beginning, and there may be more issues there, potentially, as to whether he could even stand and whether he should proceed with field sobriety tests.

THE COURT: Cutting to the chase here, the law is, of course these cases can come on in infinite variety, but when all is said and done, do I take it that it's your position that by virtue of the plaintiff's, by virtue of the absence of any overt stumbling or falling or indicia that this individual was a danger, a discrete danger to himself if left even momentarily unattended, his fall was not foreseeable and, therefore, the conduct could not be grossly negligent?

MS. FRIEDLINE: Yes, certainly going back to all of the elements of the state-created danger, that's precisely right.

THE COURT: Now, you say they didn't create the danger, either. But isn't that -- assuming that there was a danger, isn't that a little sophistical, clearly they didn't pour the alcohol down his throat, he did that. And he decided to park the car where he did and fall asleep. He did that. But they did get him out of the car and they did get him up on his feet. And they did walk him to the police car. So absent that happening, while something else even worse may have happened, he may have decided to turn the car on and drive away, but for the police, he would not have found himself in front of the police car where he fell down?

MS. FRIEDLINE: In that very strict analysis of the case, yes. However, I don't think that the Third Circuit in Bright, when they stressed that this must be a case of misuse of state authority and affirmative action to get that fourth prong of state-created danger -- when you look at Kneipp and you look at the cases that Kneipp grew out of, which were other abandonment cases where a person's arrested, they leave the passenger by the road and she gets raped; or a drag racer is arrested and they leave the children in the car next to an eight-lane highway; the abandonment, the affirmative action there, I submit, can't compare with what happened here, which is in the course of a lawful DUI arrest.

8

THE COURT: But to be sure, abandonment in the sense that it's used in those cases, is simply one, albeit not the exclusive indicia of conduct that can rise to the level of conscience shocking. For instance, if you had a severely disabled and drunken and stumbling individual that as soon as you take him out of the car, he or she falls flat on his face. The trooper gets him up again, has him do the field sobriety test. He's doing that and he falls again. The trooper gets him up again. And on the third fall he really falls and cracks his head open. The requirement that he continue to do a test, hypothetically, in the face of demonstrable evidence that he was injuring himself while doing it, without assistance, physical assistance from the officer, that's a functional abandonment within the meaning of those cases, isn't it?

MS. FRIEDLINE: I disagree, your Honor. I really do believe --

THE COURT: Wouldn't the scenario -- taking up on your point that if you were here on the other guy, you're not sure you would have moved for summary judgment. Isn't there a sliding scale of severity of drunk, where if a police officer would know it and would continue to insist that the person perform physical activity of which they were on notice that it would likely cause harm, theoretically, on a certain set of facts, would it state a cause of action?

MS. FRIEDLINE: I don't disagree with that.

9

THE COURT: Okay. If that would, though, if somewhere on the sliding continuum that would state a set of facts, and if for purposes of the qualified immunity analysis the test is what a reasonable police officer essentially would have known the constitutional lay of the law land was, and recognizing that there doesn't have to be perfect symmetry between situations, but you can reasonably interpolate what might happen, why wouldn't Kneipp, at least in theory, put an officer on notice in a case like this, constitutional notice?

MS. FRIEDLINE: I don't believe there is a reasonable parallel that can be drawn by a reasonable officer between those two cases. Remember what Kneipp did not say. Kneipp focused on the conduct that was violative of the Constitution. Involved a series of events, and over and over again the Third Circuit says the conduct that we're stressing here is separating the husband and wife, separating her from the protector. Sending him home, detaining her, and sending her unescorted home in the cold while she's drunk. The case is not saying when you come across somebody that is really drunk, you better put them on the ground, you better put them in the car, you better not do a test. That's happening in that case, she is left to lean against the car for sometime and that's not the conduct being challenged or criticized.

THE COURT: I have just one other question for you. By your lights are there any disputed issues of material fact in this case?

MS. FRIEDLINE: Of issues that are material to these claims in my sense, your Honor, there are not. The video essentially establishes --

THE COURT: Essentially, the video establishes the undisputed factual scenario. And so it really becomes a pure question of law, doesn't it, as to whether or not that conduct, as reflected in the video, rises to the level sufficient to support a claim?

MS. FRIEDLINE: Yes, your Honor. The issue is this officer's conduct in that 10-minute timeframe. It's not his mind set, it's not his intent whether he was out to get this guy or whether he thought the world of him is irrelevant. It is his conduct which can be viewed and this court can determine as a matter of law that no reasonable fact finder could see that.

THE COURT: All right, let me hear from your counterpart.

MS. FRIEDLINE: Thank you, your Honor.

MR. FEINSTEIN: Good morning.

THE COURT: Good morning.

MR. FEINSTEIN: Your Honor, I think to look at this case --

THE COURT: Which I quite literally have.

MR. FEINSTEIN: I think you have to look at this

case in light of the fact of why we even have a DUI statute in the first place. The DUI statute exists to protect the public in general and the driver from dangers to himself. In light of that, the duty upon the police officer when he's investigating a DUI, it has to be done for the purposes of protecting the public in general and the person who is the suspect in this case. And, your Honor's questions have really pointed out the deficiencies in the motion for summary judgment. When you look at the case and the facts, and I understand, I know what the tape shows. But when I took the trooper's deposition, the trooper specifically stated yes, he was aware of the possibility that this person could fall. Subjectively dismissed that possibility as being not realistic. And that was in light of the fact that -- when I was questioning him and in his report, there was numerous indicia of significant intoxication, including disheveled appearance, all of the others, slurred speech, unsteady on the feet. Manifestations of being intoxicated, but it goes even further in this case. The suspect, the plaintiff in this case, was too intoxicated to even perform the field sobriety tests. And one of them, one of them wasn't even attempted. One of them, the trooper testified, that the person could not, the plaintiff could not understand the instructions. And the third one he couldn't perform at all. And in light of this, he allowed Mr. Bill to walk to the car unescorted while he went to get a preliminary

12

breathalyzer test because he wasn't sure yet, he meaning Trooper Sternby, wasn't sure yet whether he had probable cause to arrest this individual, who was too intoxicated to perform the field sobriety tests. He was more concerned with the validity of the arrest than he was --

THE COURT: I don't see, in the grand scheme of things maybe that's a factor to crank in, but I really don't see a concern on the part of an officer as to the integrity of the evidence that is being gathered, as to how the evidence is being gathered that might impact on a potential arrest is really cutting necessarily one way or the other. Let me ask you this, cutting right to the heart of this thing. We have a fellow who's done about 200 arrests, DUI arrests, as I remember the record.

MR. FEINSTEIN: Yes.

THE COURT: And, presumably, of various degrees of intoxication, one can assume. He has never had anyone in almost Redwood tree like fashion just stand there and fall over. Recognizing that constitutional torts aren't supposed to be converted, 1983 constitutional torts aren't really supposed to be easily converted or converted at all into simple common law negligence, tell me, as I look at the tape -- within the constitutional meaning, what is constitutionally shocking to me -- don't you really have at best, if you have it, a simple negligence case here?

MR. FEINSTEIN: No, your Honor, I don't think so. I also would like to touch back because I disagree concerning the integrity of the evidence.

THE COURT: All right, tell me about that?

MR. FEINSTEIN: And I think that's incredibly important in this case. Because it goes back again to what is a police officer supposed to do.

THE COURT: Let me flip it around and then you can come back and answer my question as to precisely what was so grossly negligent that it should shock my judicial bones, so to speak. I guess the one way to ask it is to ask you this. What did he do that or what didn't he do that he should have done that if he would have done, we wouldn't be here?

MR. FEINSTEIN: He should have escorted Mr. Bill to the police car and placed him in the back of the car for his own safety. If he had done that, we wouldn't be here today. Absolutely, positively would not be here today. And the only reason why he didn't do that, what he justifies is, he believed that he needed to do a preliminary breathalyzer test. Which is shocking to me. Here's a person who has had over 200 arrests for DUI, according to his own testimony, and doesn't know when he has probable cause. Of what value is a preliminary breathalyzer test when it's not even admissible.

THE COURT: Just parenthetically, most people don't complain that they were arrested too slowly, most complain that

they were arrested too quickly.

MR. FEINSTEIN: Most people aren't in this circumstance, your Honor. And this is a person who was so intoxicated, he doesn't remember the night, in addition to striking his head --

THE COURT: I understand he doesn't remember the night at all?

MR. FEINSTEIN: He doesn't remember the night at all. But he was so intoxicated that he couldn't do the field sobriety tests.

THE COURT: It's neither here nor there in terms of this motion to be sure, but it's a matter of curiosity, what were the nature of his injuries and how severe were they?

MR. FEINSTEIN: He had fractured ribs, a closed head injury, with cognitive dysfunction.

THE COURT: All right. To this day does he suffer from the residuals of the closed head injury?

MR. FEINSTEIN: That's a difficult question to answer. Because I have not spoken to anybody who knew him prior to the time of the events. And he hasn't seen a doctor since -- within a few months of the accident.

THE COURT: He actually cracked his head open when he hit the ground?

MR. FEINSTEIN: I believe that it may have been a gash, but it was described as a closed head injury. But the

15

fact also is that he had had a previous head injury. So there are memory problems. But, as I sit here today, I'm not going to make a representation to the court that I'm sure that his residual memory problems didn't preexist the incident.

THE COURT: Now, on this record and on these facts, hypothetically, if I were to declare, because there are no material facts in dispute here, it seems to me someone is going to win, someone is going to lose. I don't think there's a cross-motion for summary judgment on your behalf?

MR. FEINSTEIN: There isn't, your Honor. But I will also say that I disagree as to whether there are material facts in dispute. I believe there is one very key material fact in dispute.

THE COURT: What would that be?

MR. FEINSTEIN: And that would be the intent of the trooper. And that has to be decided by a jury. The court cannot rule on the intent of the trooper at the time based upon what he seen. The court can rule upon the observations, but the court cannot rule as to what the subjective intent was at the time. And the only person who has testified about the subjective intent is the trooper, and the jury has the right to evaluate that credibility. And has the obligation to evaluate that credibility.

THE COURT: Run that by me again. Are you saying as I determine whether or not this is a conscience-shocking

situation, that I do not bring to bear on it an objective standard, that it is a subjective standard, I don't think that's correct?

MR. FEINSTEIN: I want to be clear about what I'm saying. If your Honor is of the opinion that the conduct that he sees on the tape does not shock the conscience, that is an objective standard with regard to that. However, as it pertains to issues of gross negligence, that deals specifically with the mind set and the intent of the parties engaged in the activities.

THE COURT: Well, I thought -- we'll look at it, I'm not saying you're right or you're wrong, but I thought that negligence law or tort law, if you will, as I remember from first year torts, employs the reasonable man standard. So it's not the reasonable man, in other words, the defendant, it's the, broad, reasonable man. It doesn't matter what the person is thinking because even if they were thinking what they thought was correct, they could still be negligent, couldn't they?

MR. FEINSTEIN: That would be correct. However, the jury should have the opportunity to decide whether Trooper Sternby -- well, actually let me backtrack just a second. I want to go back to the testimony that Trooper Sternby had when I asked him with regard to his knowledge of the possibility that Mr. Bill would fall. Now, in that testimony Trooper

Sternby said yeah, I knew it was possible, but I really kind of discounted it.

THE COURT: Right, that's pretty much the upshot of what he said.

MR. FEINSTEIN: Right. The jury has the opportunity or should have the opportunity to say whether that statement, whether that conduct right there, is shocking in light of all the other evidence in the case. And whether the trooper should have been more cognizant of the risk of falling and injuring, of Mr. Bill falling and injuring himself, in light of all the other evidence in the case. And that's the possibility where the jury can come back and then say, you know what, he's full of nonsense, he should have known that there was a significant risk, never should have discounted it and that shocks my conscience that he was more concerned about the validity of the arrest than he was when he discounted the possibility that this person is going to fall and hurt themselves.

THE COURT: If you're right, from a constitutional sense about this particular fact scenario, wouldn't I potentially be creating a situation where every state trooper who makes a DUI stop is going to tiptoe around the issue, be afraid to do anything other than put someone, who they believe to be intoxicated, immediately in the back of their trooper car without any meaningful ability to exercise the type of discretion on the scene that people expect?

MR. FEINSTEIN: The answer to that question is probably yes. But keep in mind, keep two things in mind. As long as the police officer has a reasonable belief that the person is intoxicated, they have a right to ask for a blood test, which every licensed driver has the obligation to submit to. And also under the Motor Vehicle Code as it's written, you do not need field sobriety tests in order to get a conviction for DUI. If in the estimation of a subjective belief, even in the subjective belief of the police officers, if the person is too intoxicated to drive, they can still get a conviction. Now, are we per chance having a risk that field sobriety tests may be outlawed based upon the outcome of this case, that is conceivably possible. But under the Kneipp case, it's clear that when somebody does come across somebody who is in an intoxicated state, the police officer is on notice of the fact that there are constitutional rights that may be implicated here.

THE COURT: Let me ask you two other questions. If your fellow, your client in this case, rather than having fallen as he did without being held on to, he was attended in a broad sense, the police officer walked him up, but he wasn't holding on to him. Assume for the sake of my question that the officer and he were standing at the front of the car, the officer had his hand, holding him by his arm to stabilize him, and yet he suddenly tipped over and pried loose of the

19

officer's grasp, given the suddenness of the fall, would you still be here?

MR. FEINSTEIN: It's unlikely under that scenario that we would be here. At least under those circumstances, the police officer would have taken some precautions to make sure that he hadn't fallen. But there were none taken in this case. In light of the fact that there was clear and severe intoxication. Now, I agree that the tape doesn't show somebody staggering all over the place and falling --

THE COURT: Arguably, in the same sense that defense counsel indicated that it's better for her side that your plaintiff is the plaintiff, it would be better for you in a sense if the other driver was the plaintiff, in terms of what I saw on the tape, wouldn't it, in terms of advanced notice, arguably?

MR. FEINSTEIN: I would agree with that, that the passenger appeared to be less stable on the feet.

THE COURT: In fact, the officer grabbed him literally and pulled him to the side.

MR. FEINSTEIN: I would agree with that. But the one thing the tape doesn't show, the one thing you'll never be able to see on the tape and the jury will never be able to see on the tape, is the real interaction between the two because there's no audio and, also, there's really not a closeup on Mr. Bill's face until he approaches the car.

THE COURT: Very short there, too.

MR. FEINSTEIN: And that was very short.

THE COURT: I saw his face as he was falling over, basically.

MR. FEINSTEIN: Your Honor, actually I want to go back to one of your questions, I want to change my answer.

THE COURT: All right, you can.

MR. FEINSTEIN: The reason I want to change my answer is when we're talking about the damage that would be done to field sobriety tests. Because I am concerned about the validity of field sobriety tests. Not only because I drive the roads, but I also do criminal defense work.

THE COURT: You have a two-edge sword here.

MR. FEINSTEIN: Yes, I do. And I am concerned about it, though. I will tell you that in this particular case the problem occurred with Trooper Sternby after the field sobriety tests were attempted. The reason why that becomes important is going back to your question, you were asking about people tiptoeing around these things --

THE COURT: Right.

MR. FEINSTEIN: Okay. In the scenario that was given here, may not be the typical scenario that you have on a DUI stop. When the police officer gives the field sobriety test, if the person is capable of understanding any of the instructions, capable of at least attempting the field sobriety

tests, that's a different situation than what we have here, where the person couldn't understand the instructions, couldn't do the field sobriety tests even at all. So going back to one of the comments that you made to defense counsel, we're talking about a sliding scale here. When you get to the sliding scale where a person is so intoxicated that they can't understand the instructions, at that point the police officer or the trooper has to have a different set of behavior than otherwise. And that's where the difference comes in. So if the trooper -- that constitutional issue has to come in, as soon as the trooper is on notice that this person is so intoxicated that they can't even perform the field sobriety tests. And I know the court doesn't seem as concerned as I am about the fact the trooper was concerned about the validity of the arrest. But, quite frankly, that shocks me because, as I said, this is a person who has had over 200 arrests and doesn't understand what probable cause is --

THE COURT: This would be true too, though, wouldn't it. If your position was taken to its logical extreme, as soon as-- in many cases, as soon as a police officer became convinced that someone was quite intoxicated, they would then abandon the physical part of the physical agility test, losing part of their potential evidence that they would otherwise use and have to rely exclusively on a blood test, which are always and legitimately sometimes susceptible to defense attack?

MR. FEINSTEIN: Except the fact that the testimony of the police officer in and of itself that says this person was too intoxicated to perform the tests, could and should be sufficient to, if believed by a jury, could be and would be enough to get a conviction in a DUI case. And the blood test, although the way the blood test is taken can be attacked and how long it's done after the arrest can be attacked. Blood tests themselves, assuming that it's accurate, is conclusive under the statute. In fact, most people, as an aside, most people don't understand that there are two different sections to the statute that you can be convicted on.

THE COURT: I don't think we need to get too far down there.

MR. FEINSTEIN: I don't want to go too far down the road, but you can be convicted under two different theories; one is the subjective belief of the police officer and the other is the conclusive presumption created by the blood test.

THE COURT: All right, I hope I gave you your moneys worth, thank you for making the trip.

MR. FEINSTEIN: Thank you, your Honor.

THE COURT: Is there anything else you want to say to me?

MS. FRIEDLINE: Yes, your Honor. I would ask you to revisit some of your opinion in the Neuburger case.

THE COURT: On what point?

23

MS. FRIEDLINE: In that case you cited to several cases cautioning against engaging in retroactive speculation about what conduct should have taken place by an officer. That was done in a Fourth Amendment argument --

THE COURT: That wasn't a state-created danger case, though?

MS. FRIEDLINE: Well, it was that issue there, but what I'm saying is, what is even more compelling here, under the Fourth Amendment analysis you're looking at reasonableness. Here we're looking at arbitrariness.

THE COURT: That was the case where the suicidal lady was shot by the state trooper, is that right?

MS. FRIEDLINE: Yes. And this case plays into are we going to revisit and reevaluate with hindsight that the officer should have grabbed his arm at some point, that the officer shouldn't have let him stand --

THE COURT: Well, he says if I read the transcript, which I did look at his transcript, he said the thought crossed my mind that he could fall, but I thought it wasn't likely. What about his subjective intent?

MS. FRIEDLINE: That is not -- your Honor, if subjective intent is relevant here, then his good intentions should be a defense. And that's not the case in a 1983 action or in a negligence action, as you stated. What matters is his conduct and what matters is your Honor's ability to evaluate that conduct on an objective standard. But if we're going to say his intent, that he didn't care, whatever, matters, well, his intent that he cared and was trying to do a good job matters, too. That unfortunately for me is not a defense, so I don't think it can be the other way. Thank you.

THE COURT: All right, let's go off the record here, thank you.

(Discussion held off the record.)

(Whereupon, at 10:45 a.m., the proceedings were concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Ronald J. Bench